

MARY GOMEZ

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DOCKET NO. 184,574 & 184,575

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MARY GOMEZ

Claimant

VS.

STORMONT-VAIL REGIONAL MEDICAL CENTER

Respondent

AND

SELF-INSURED

Insurance Carrier

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Docket No. 184,574 & 184,575

ORDER

ON the 31st day of March, 1994, the application of the respondent for review by the Workers Compensation Appeals Board of an Order entered by Administrative Law Judge Floyd V. Palmer dated February 28, 1994, came on for oral argument.

APPEARANCES

The claimant appeared by and through her attorney Michael J. Unrein of Topeka, Kansas. The respondent, a self-insured, appeared by and through its attorney James C. Wright of Topeka, Kansas. There were no other appearances.

RECORD

The record consists of the transcript of the preliminary hearing of February 24, 1994, and the admitted exhibits attached thereto, including the affidavit of Mr. Dennis Moses.

ISSUES

The following issues are presented for review:

- (1) Whether the Appeals Board has jurisdiction to decide this appeal;
- (2) Whether claimant's injury arose out of and in the course of her employment; and
- (3) Whether claimant gave appropriate notice or, if not, whether there was just cause for failing to do so.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

- (1) The Appeals Board has jurisdiction to consider the issues raised in this appeal in accordance with the provisions of K.S.A. 44-551 and K.S.A. 44-534a.
- (2)(3) For the reasons set forth below the Appeals Board affirms the decision of the Administrative Law Judge granting temporary total and medical benefits.

Claimant alleges that she was injured on August 29, 1993, while restraining a patient. She states that she was thrown against the wall and injured her low back. The evidence further indicates claimant had previously injured her low back on June 26, 1993, when she tripped over a cord at work. Respondent does not here dispute the June 26, 1993, accident but contends that there was no new accident on August 29, 1993.

In opposition to claimant's testimony there is, as respondent points out, significant evidence which would give rise to concern about the validity of claimant's version of the facts. At the time of the incident in question, claimant filled out an accident report for another employee who had been cut in the incident but did not fill out an incident report relating to her own injury. Claimant did not seek medical attention for her low back injury until October 12, 1993. The records relating to that October 12 visit are silent regarding the cause of her low back condition. In addition, the affidavit of Mr. Moses contradicts the testimony given by claimant. In that affidavit Mr. Moses indicates that he was aware of the incident on August 29, but that claimant did not report an injury to him. His affidavit indicates that claimant called in on October 11, 1993, indicating she had overdone it on the weekend. This would have been one day before the October 12, 1993, visit to Dr. Knappenberger.

This case turns primarily on the credibility and believability of the witnesses. The Administrative Law Judge has had an opportunity to observe the claimant testify, and awarded benefits. Although on its face, the affidavit of Mr. Moses appears persuasive, Mr. Moses has not been subject to cross-examination. In light of those two factors the Appeals Board chooses to affirm the decision of the Administrative Law Judge in his award of benefits in this case. Accordingly, the Appeals Board finds both that the claimant did suffer accidental injury on October 29, 1993, arising out of and in the course of her employment

and that she did give notice to Mr. Moses sufficient to satisfy the requirements of K.S.A. 44-520.

AWARD

WHEREFORE, it is the finding, decision and order of the Appeals Board that the Order of Administrative Law Judge Floyd V. Palmer dated February 24, 1994, is hereby affirmed in all respects.

IT IS SO ORDERED.

Dated this _____ day of May, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

cc: Michael J. Unrein, PO Box 3575, Topeka, Kansas 66601-3575
James C. Wright, 1400 Bank IV Tower, Topeka, Kansas 66603
Floyd V. Palmer, Administrative Law Judge
George Gomez, Director